

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil No.
)	
KENTUCKY UTILITIES COMPANY,)	
)	
Defendant.)	

COMPLAINT

The United States of America ("United States"), by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), files this Complaint and alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq., as amended by the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701 et seq., seeking civil penalties against Kentucky Utilities Company ("Defendant" or "KU") for the discharge of oil into navigable waters of the United States and adjoining shorelines, and for failure to timely submit a Facilities Response Plan ("FRP").

JURISDICTION, AUTHORITY AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, 1355, and Section 311(b) (7) (E) of the CWA, 33 U.S.C. § 1321(b) (7) (E).

3. Authority to bring this action is vested in the United States Department of Justice by Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

4. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1395(a), and Section 311(b) (7) (E), because defendant is located, resides or is doing business, and is found in this District.

5. Notice of the commencement of this action is being given to the Commonwealth of Kentucky pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

DEFENDANT

6. Defendant Kentucky Utilities Company is a corporation organized and existing under the laws of the Commonwealth of Kentucky and licensed to do business therein.

7. Defendant is a "person" within the meaning of Section 311(a) (7) of the CWA, 33 U.S.C. § 1321(a) (7).

STATUTORY BACKGROUND

Prohibition of Oil Discharges

8. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, except as authorized by and in compliance with other sections of the CWA.

9. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

10. Oil is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

11. Section 311(b) (3) of the CWA, 33 U.S.C. § 1321(b) (3), prohibits the discharge of oil into or upon navigable waters of the United States and adjoining shorelines in such quantities as the President determines may be harmful to the public health or welfare or the environment of the United States.

12. Pursuant to Section 311(b) (4) of the CWA, 33 U.S.C. § 1321(b) (4), EPA, acting through its delegated authority under Executive Order No. 11735, 38 Fed. Reg. 21243 (August 7, 1973), has determined by regulation that the quantities of oil that may be harmful to the public health or welfare or the environment of the United States are discharges of oil that violate applicable water quality standards, or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath

the surface of the water or upon the adjoining shorelines. 40 C.F.R. § 110.3.

FRP Requirements

13. Section 311(j) (5) (A) of the CWA, 33 U.S.C. § 1321(j) (5) (A), requires the owners or operators of certain tank vessels and facilities to prepare and submit a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such discharge, of oil. EPA has determined by regulation that such facilities in operation on or before February 18, 1993 that did not submit a plan by that date must have prepared and submitted an FRP that conforms to the regulations before August 30, 1994. 40 C.F.R. § 112.20(a) (1) (ii).

14. Section 311(j) (5) (B) of the CWA, 33 U.S.C. § 1321(j) (5) (A) describes one type of facility required to prepare and submit an FRP as an onshore facility that could reasonably be expected to cause substantial harm to the environment by discharging into navigable waters or adjoining shorelines.

15. EPA has determined by regulation that facilities that could cause "substantial harm" to the environment in the event of a discharge into navigable waters include those with a total oil storage capacity of 1 million gallons or more, and which are located such that a discharge could cause injury to

fish and wildlife, or, would shut down a public drinking water intake. 40 C.F.R. 112.20(f)(1).

Civil Penalties

16. Section 311(b)(7)(A) of the CWA, 33 U.S.C. § 1321(b)(7)(A), as amended by OPA, provides that:

Any person who is the owner, operator, or person in charge of any ... offshore facility from which oil or a hazardous substance is discharged in violation of ... [Section 311(b)(3) of the CWA], shall be subject to a civil penalty in an amount up to \$25,000 per day of violation or an amount up to \$1,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged.

17. Pursuant to the Debt Collection Improvement Act of 1996, civil penalties pursuant to Section 311(b)(7)(A) of the CWA were increased for Section 311(b)(3) violations occurring on or after January 31, 1997, to \$1,100 per barrel of oil discharged or \$27,500 per day of violation.

18. Section 311(b)(7)(C) of the CWA, 33 U.S.C. § 1321(b)(7)(C), as amended by OPA, provides that:

Any person who fails or refuses to comply with any regulation issued under subsection (j) of this section shall be subject to a civil penalty in an amount up to \$25,000 per day of violation.

19. Pursuant to the Debt Collection Improvement Act of 1996, civil penalties pursuant to Section 311(b)(7)(C) of the CWA were increased for Section 311(j) violations occurring on or after January 31, 1997, to \$27,500 per day of violation.

GENERAL ALLEGATIONS

20. Defendant is an electric utility company that provides power to 77 Kentucky counties and five Virginia counties.

21. Defendant is headquartered in Lexington, Kentucky.

22. Defendant is an "owner or operator" of an "on-shore facility" within the meaning of Section 311(a)(6) and (10) of the CWA, 33 U.S.C. §§ 1321(a)(6) and 1321(a)(10), and is a "person" within the meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

23. Defendant's E.W. Brown Generating Station, in Burgin, Kentucky ("Station") has a total oil storage capacity of 1 million gallons or more.

Oil Discharges

24. On October 2, 1999, Defendant discharged approximately 38,000 gallons (904 barrels) of diesel fuel oil from the Station. The source and cause of the spill was a cracked valve in an underground pipeline.

25. The discharged oil flowed offsite to the adjacent Cedar Branch Creek, a tributary of the Kentucky River. Oil contaminated approximately a mile's length of the creek. The large size of the spill and the area's porous limestone topography gave rise to concerns of groundwater contamination.

26. Upon receiving word of the spill, state and local officials temporarily shut down a nearby public drinking water intake along the Kentucky River.

27. On information and belief, on January 8, 2001 and on other days during that month, Defendant discharged an unknown quantity of oil from the Station. The source and cause of the spill was a leak from several tubes in a cooling tower.

28. The discharged oil entered Herrington Lake and created a sheen on its surface that lasted, intermittently, for approximately two weeks.

29. The diesel fuel and oil discharged into the environment on October 2, 1999 and in January 2001 are highly toxic to aquatic life and other wildlife. Small concentrations of oil in water can cause death to aquatic organisms including fish, or impair their growth and reproductive capabilities. Minute quantities of oil can also cause reproductive impairment in other wildlife. Aquatic systems may require years to recover from the environmental harm caused by large oil spills.

30. Drinking water supplies may be impaired by spilled oil from contamination or restrictions in use. Oil spills can further harm the public by destroying the recreational benefits of impacted creeks, lakes and rivers.

31. Cedar Branch Creek, Herrington Lake, and the Kentucky River are "navigable waters of the United States" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

32. Diesel fuel and lubricating oil, which are stored and used by KU, are both "oil" within the meaning of CWA Section 311(a)(1), 33 U.S.C. § 1321(a)(1), and a "pollutant" within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

33. Defendant has "discharged" oil within the meaning of CWA Sections 311(a)(2), 33 U.S.C. § 1321(a)(2), and Section 502(16), 33 U.S.C. § 1362(16), in such quantities as may be harmful as determined by the President.

34. The quantity of diesel fuel and oil discharged at KU's Station was sufficient to and did cause a sheen or discoloration of the navigable waters or adjoining shorelines.

35. Defendant has discharged oil in violation of Section 301(a), 33 U.S.C. § 1311(a).

Violation of FRP Requirements

36. Until April 19, 2000, KU had not submitted an FRP for the Station to EPA.

37. KU was required to prepare and submit an FRP before August 30, 1994, because the Station could reasonably be expected to "cause substantial harm to the environment" by discharging oil into or upon navigable waters or adjoining shorelines, within the

meaning of Section 311(j) (5) (B) (iii), 33 U.S.C. § 1321(j) (5) (B) (iii), and 40 C.F.R. Part 112, App. C.

CLAIM FOR RELIEF

PENALTIES UNDER SECTION 311(b) OF THE CWA

38. Paragraphs 1 through 37 are realleged and incorporated herein.

39. Defendant's discharge of oil as described in Paragraphs 24-26 violated Section 311(b) (3) of the CWA, 33 U.S.C. § 1321(b) (3). As the spill occurred after January 31, 1997, Defendant is liable for a civil penalty of up to \$1,100 per barrel of oil discharged, pursuant to Section 311(b) (7) (A) of the CWA, 33 U.S.C. § 1321(b) (7) (A), as amended by Pub. L. 104-134 and 61 Fed. Reg. 69360.

40. Defendant's discharge of oil as described in Paragraphs 27 and 28 violated Section 311(b) (3) of the CWA, 33 U.S.C. § 1321(b) (3). As the spill occurred after January 31, 1997, Defendant is liable for a civil penalty of up to \$1,100 per barrel of oil discharged or up to \$27,500 per day of violation, pursuant to Section 311(b) (7) (A) of the CWA, 33 U.S.C. § 1321(b) (7) (A), as amended by Pub. L. 104-134 and 61 Fed. Reg. 69360.

41. Defendant's failure to timely prepare and submit an FRP as described in Paragraph 36 violated Section 311(j) (5) (A), 33 U.S.C. § 1321(j) (5) (A). Defendant is liable for a civil penalty of up to \$27,500 per day of violation, pursuant to

Section 311(b)(7)(C) of the CWA as amended by Pub. L. 104-134 and 61 Fed. Reg. 69360.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, prays that the Court:

1. Impose civil penalties on Defendant in an amount up to \$1,100 per barrel of oil discharged, for that discharge alleged in Paragraphs 23-25;

2. Impose civil penalties on Defendants in an amount up to \$27,500 per day of violation, for that discharge alleged in Paragraphs 26 and 27;

3. Impose civil penalties on Defendant in an amount up to \$27,500 per day of violation, for that failure to timely submit an FRP alleged in Paragraph 35; and

4. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

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